

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0020, Concord General Mutual Insurance Company as Subrogee of David and Patricia Beffa-Negrini v. Peter W. White & a., the court on September 23, 2004, issued the following order:

The plaintiff, Concord General Mutual Insurance Company (Concord General), appeals an order of the trial court granting summary judgment to the defendants in this subrogation action. We reverse.

“In reviewing the trial court’s grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party.” Godbout v. Lloyd’s Ins. Syndicates, 150 N.H. 103, 105 (2003). “Summary judgment is proper only if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Cricklewood on the Bellamy Condo. Assoc. v. Cricklewood on the Bellamy Trust, 147 N.H. 733, 736 (2002).

The trial court found that the evidence showed that all of the terms of the contract between the Beffa-Negrinis and the original contractor, Jeff Kennedy, were agreed upon by the Beffa-Negrinis and the new contractor, Peter White. According to the trial court, “[t]here were absolutely no changes from the terms of the AIA contract after White took over” other than the substitution of White for Kennedy. “[A]fter the substitution, the AIA contract terms . . . continued to be observed and the AIA contract remained in full force and effect until the fire.” White’s own deposition testimony contradicts this finding, however.

For instance, although the contract provided that all change orders “shall be authorized by written Change Order signed by the Owner, Contractor and Architect” or by a written change directive signed by the “Owner and Architect,” White testified that he and the Beffa-Negrinis had no agreement “about how change orders would be handled.” Similarly, although the contract provided that the Beffa-Negrinis would pay the contractor \$388,547.00 for performance of the contract, White testified that he and the Beffa-Negrinis had no agreement “as to how much it was going to cost to complete the home.” Although the contract between the Beffa-Negrinis and Kennedy stated that time was of the essence and that the home was to be built by May 1998, White testified that he and the Beffa-Negrinis had no agreement “as to when the house would be completed.”

Mr. Beffa-Negrini also testified that he never discussed with White the contract he had with Kennedy:

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Q. Did you pretty much have the same deal or keep the same terms of the contract with Peter White?

A. It wasn't discussed.

. . . .

Q. Was it your understanding that Peter White just continued on the completion of the contract as Exhibit 1 here?

A. The contract wasn't discussed with Peter.

. . . .

Q. Did you ever discuss with Mr. White whether or not this contract would be or the terms of it would be readdressed after Jeff Kennedy left the job site?

A. I don't believe so. I don't think I ever talked to the contract with Peter.

Mr. Beffa-Negrini further testified that he was not sure whether the contract with Kennedy continued to be viable even before Kennedy left:

Q. Did you understand this contract to be in effect until the house was substantially complete?

. . . .

A. This contract, because it was a meeting of Peter and Jeff after this contract to say, hey, Dave, Patsy, we're not going to be able to finish this in the amount of time or money that we originally thought we were.

Q. So there was no discussion relative to whether Mr. Kennedy would or would not remain liable on this

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contract even after he left and all the people that had been working under him stayed to complete it with Mr. White?

A. Yeah. Again, I think in my head back at that time we had already kind of surpassed this contract in time and dollars. . . .

. . . .

Q. Did you consider all bets were off once the time date of completion and price changed? . . . That this contract is now garbage[?]

A. In a sense probably. You have an agreement. People stick to it or they don't. There was discussion that it didn't look like they were going to meet this. And we said, okay, what do we do? This is what we need to do. We need X time more to do this, whatever. Fine, let's continue.

In light of this testimony and in light of our duty to consider the evidence and all inferences properly drawn from them in the light most favorable to the Beffa-Negrinis, see Godbout, 150 N.H. at 105, we hold that it was error for the trial court to rule, as a matter of law, that the entire contract between the Beffa-Negrinis and Kennedy was in "full force and effect" until the fire. Accordingly, we conclude that the trial court erroneously granted summary judgment to the defendants.

Reversed and remanded.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox
Clerk**

Distribution:

Clerk, Cheshire County Superior Court 01-C-0145

Honorable David B. Sullivan

Honorable Robert J. Lynn

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